(13)

No. 90-1029

In The

Supreme Court of the United States

October Term, 1991

EASTMAN KODAK COMPANY,

Petitioner,

vs.

IMAGE TECHNICAL SERVICES, INC.; J-E-S-P CO., INC.; SHIELDS BUSINESS MACHINES, INC.; MICRO-GRAPHIC SERVICES, INC.; MICRO MAINTENANCE, INC.; ATLANTA GENERAL MICROFILM CO., INC.; ROGER KATONA, D/B/A G. & S. ELECTRONICS; AMTECH EQUIPMENT MAINTENANCE, INC.; ADVANCED SYSTEMS SERVICES, INC.; B.C.S. TECHNICAL SERVICES, INC.; BOB INGLE, INC.; DATA PROX EQUIPMENT CO.; FISHER MICROGRAPHICS, INC.; I.O.A. DATA CORP.; SEARLE ENTERPRISES, D/B/A MICRO IMAGE, INC.; MIDWEST MICROFILM EQUIPMENT & SERVICE, INC.; OMNI MICROGRAPHIC SERVICES, INC.; AND CPO, LTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Does a vertically-integrated equipment manufacturer which concededly lacks market power in fiercely competitive interbrand equipment markets violate the Sherman Act by declining to sell replacement parts to independent service organizations?

2. Did the Court of Appeals properly permit a *per se* tying claim based on the alleged tying of two single brand aftermarkets (tying Kodak service to Kodak parts) that are wholly derivative of a competitive interbrand equipment market?

3. Does speculation about unspecified market imperfections constitute the "more persuasive evidence" required under *Matsushita* to defeat summary judgment in an economically implausible antitrust case?

4. If a manufacturer has no market power in an interbrand equipment market and has legitimate business justifications for not selling replacement parts to service competitors, can it monopolize a market limited to service of its own equipment on the theory that its own branded replacement parts constitute an "essential facility?"

LIST OF PARTIES AND RULE 29.1 LIST

The caption of this brief identifies all parties in the lower court. Petitioner Eastman Kodak Company has no parent corporation. Kodak's subsidiaries, other than wholly owned subsidiaries, are listed below:

Actifoto, LDA
Bellevue Photo S.A.R.L.
Consumer Developments Ltd.
Dainichiseika-Sterling Co., Ltd.
Ditram S.A.R.L.
India Photographic Company Limited
Inrock Chemical Co. Ltd.
K.K. Big Color Service
K.K. East West
K.K. Hiyama Photo Studio
K.K. IS Photo
K.K. Joy
K.K. Kyohai
K.K. Nihonbashi Pro Color
K.K. Qualte
K.K. Techni-Color Angel
Kodak & H-Color De Forenede Fotolabortorier A/S
Kodak Imagica K.K.
Kodak Japan Ltd.
Kodak Korea Limited
Kodak Lab Chiba K.K.
Kodak Lab Shizuoka K.K.
Kodak Lab Kanagawa K.K.
Kodak Medical Ltd.
Les Laboratoires Photographiques de France S.A.
LK-TEL Video S.A.
Mackwoods-Winthrop Ltd.
Miller Bros. Hall & Company Limited
Muebles Andes S.A.
Nippon System House Co., Ltd.

LIST OF PARTIES AND RULE 29.1 LIST – Continued

P.T. Sterling Products Indonesia
Photo Finishers (Glasgow) Limited
Reflex Photo Works Limited
The Roll Film Company Limited
Sterling Drug (Malaya) Sdn. Bhd.
Sterling Farmaceutica Portuguesa Lda.
Sterling Products (Ghana) Ltd.
Sterling Products (Nigeria) Ltd.
Sterling Products Pakistan (Private) Ltd.
Sterling Yamanouchi Pharmaceutical Inc.
Taylors Developing & Printing Works Limited
Videoplex, Lta.
Winster Pharmaceuticals Ltd.
Y. K. Kamata Pro Photo
Yamagata Taigyo, Ltd.

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PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 903 F.2d 612 (9th Cir. 1990), and is reprinted in the

Appendix to Petitioner Eastman Kodak Company's Petition for *Certiorari* ("Pet. App.") at 1A-28A. The District Court's unpublished opinion and order granting Kodak's motion for summary judgment is reprinted at Pet. App. 29B-38B. The Court of Appeals' unpublished order denying Kodak's petition for rehearing is reprinted at Pet. App. 39C-40C.

JURISDICTION

The Court of Appeals entered judgment on May 1, 1990. It denied a timely petition for rehearing on September 21, 1990. The Petition for *Certiorari* was filed on December 20, 1990 and was granted on June 17, 1991. This Court has jurisdiction to review the judgment by writ of *certiorari* under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes involved are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. They are set out verbatim at Pet. App. 41D.

STATEMENT OF THE CASE

A. The Parties and the Market Setting

1. Kodak's place in the interbrand equipment markets

Kodak makes and sells complex business machines — specifically, high volume photocopiers and micrographics equipment. In interbrand equipment markets,

Kodak faces fierce competition from large American and Japanese corporations. Kodak's copier competitors include Xerox, Savin, Canon, Ricoh, and Minolta. Kodak's micrographics competitors include Bell & Howell, 3M, Canon and Minolta. Joint Appendix ("J.A.") 158, 177-78. Kodak's market share is 23% in the high volume segment of the copier market and 20% in the micrographics equipment market. J.A. 158, 176-77. Respondents concede, and the Court of Appeals held, that Kodak does not have market power in either market. Pet. App. 8A n.3.

Like all sophisticated business equipment, Kodak's copiers and micrographics products require regular service and occasional repairs to function properly. J.A. 160, 179. So, as an integral part of its equipment sales business, Kodak sells service and makes or procures replacement parts used in service. Kodak provides service contractually, three different ways: (1) initial warranty service, included in the purchase price of the equipment; (2) annual service contracts, which include regular maintenance, repairs, and all necessary parts; and (3) time and material service on a "per call" basis. Kodak does not compel its equipment owners to purchase Kodak service. Indeed, Kodak customers who service their own equipment can purchase parts separately. J.A. 171-72, 190.

It is undisputed that purchasers of copiers and micrographics equipment consider service costs (including the cost of parts) to be an important component of total

equipment costs. Pet. App. 8A, 20A.[1] These aggregate "life cycle" costs are the true economic costs of Kodak's equipment. Any increase in parts or service prices necessarily increases life cycle costs and, therefore, has the same effect as a direct increase in equipment prices. J.A. 161-62, 180. Accordingly, Kodak must price its parts and service offerings competitively; otherwise, the life cycle costs of using its products will be too expensive and businesses will simply buy another manufacturer's machines. J.A. 162, 180. In this way, the competitive conditions in the equipment markets prevent Kodak from charging supercompetitive prices in any alleged aftermarkets for Kodak parts or service.

[1] Recently, respondents asserted for the first time that "there was no such concession" in the Court of Appeals. (Respondents' Supp. Brief in Opp. to Pet. for *Cert.* at 2) That is not true. Respondents conceded below that in the interbrand markets, prospective buyers of equipment "can shun an equipment seller whose parts and service are priced too high." J.A. 855. Respondents have also asserted that "consumers were well aware and cared about" the relative prices of Kodak and ISO service. (Brief in Opp. to Pet. for *Cert.* at 16 n.6) Moreover, the concession does not matter because it is undisputed Kodak operated under the assumption that prospective customers assessed the total cost of equipment, service and parts at point of sale, J.A. 161, 163, 179-80, and it is Kodak's conduct and the Court of Appeals' understanding of it that are at issue. Further, for Kodak to be effectively constrained from engaging in anticompetitive conduct, it is sufficient that a significant number of Kodak's customers consider life cycle costs. *See* note 8, *infra*. That, at the very least, is undisputed. In any event, it is too late for respondents to complain about the purported inaccuracy of the Ninth Circuit's decision, having failed to mention it in connection with Kodak's petition for rehearing in the Ninth Circuit and in its opposition to Kodak's petition for *certiorari*.

In order to enhance the competitiveness of its copiers and micrographics products, Kodak has pursued a policy of providing the highest quality service. Industry surveys have consistently rated Kodak's service the best available and Kodak's equipment the most dependable. J.A. 182. Kodak's marketing efforts emphasize its exceptional service ratings and capabilities. J.A. 163-66, 182-83; Documents Lodged with the Clerk at L041-070.

2. Independent service organizations

Respondents are 18 independent service organizations ("ISOs") located in ten different states. J.A. 6-9. They service Kodak copier and micrographics equipment, but do not manufacture parts for use in their service business. J.A. 9-10. Instead, respondents insist that Kodak must aid them in their business efforts by making, stocking and selling them Kodak parts (defined as tools, test equipment, supplies and service manuals), which they use *solely* to compete against Kodak. There is no evidence that respondents could not obtain their own parts, either by making them, buying them from original equipment manufacturers ("OEMs"), or disassembling used equipment.

B. Kodak's Practices and the Reasons for Them

The fundamental conduct at issue is Kodak's practice of not selling parts to ISOs, a simple unilateral refusal to deal. J.A. 171, 189-90. Respondents attack this conduct as monopolization and a *per se* illegal tying arrangement. The bases for the tying characterization are respondents' claims, which Kodak denies, that parts and service are

economically distinct products and that Kodak refuses to sell parts to its equipment customers if an ISO services the equipment.

There are three main business reasons for Kodak's refusal to sell parts to ISOs: (1) to promote interbrand equipment competition by allowing Kodak to stress the quality of its service; (2) to improve asset management by reducing Kodak's inventory costs; and (3) to prevent ISOs from free riding on Kodak's capital investment in equipment, parts and service.

1. Promoting interbrand competition

The relationship of service to the underlying equipment offering was central to Kodak's decisions to adopt the challenged practices.[2] J.A. 168, 171, 185. Kodak determined that it could best maintain high quality service for its sophisticated equipment by providing service itself. J.A. 168, 185. Thus, much as a manufacturer might decide to distribute its product directly rather than through independent distributors, Kodak decided not to sponsor independent, and potentially inferior, service organizations by offering them parts. Kodak believes that its service strategy enhances its ability to compete with Xerox, Canon and the other manufacturers, as discussed above. J.A. 137-38, 147-48.

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[2] Kodak established its parts practice for copiers at the time it entered that business in 1975. J.A. 184. Kodak first applied the practice to micrographics equipment in 1985. J.A. 148. It continues to sell ISOs parts for micrographics equipment introduced before 1985. J.A. 148-49.

Kodak's direct service strategy also strengthens its relationships with existing equipment customers. When an ISO has displaced Kodak, Kodak loses the day-to-day contact that it has found crucial to keeping its customer satisfied and learning of potential new sales opportunities. Even more important, divided responsibility for product performance inevitably leads to "finger-pointing." Whenever an ISO cannot repair a problem, Kodak is blamed for an equipment malfunction, even if the problem is the result of improper diagnosis, maintenance or repair by an ISO. Kodak may never even hear of the problem, yet its future sales opportunities are jeopardized. By providing service directly, Kodak can respond to customer needs and develop lasting relationships. J.A. 168-69, 186-87.

2. Controlling inventories

A second reason for the challenged practices is to improve asset management by reducing Kodak's inventory costs. In early 1985, Kodak had over $16 million of micrographic equipment parts in stock. As a company-wide effort to improve its asset management, Kodak began looking for ways to reduce and better control its parts inventory. One way was to stop making, buying and stocking parts for the benefit of ISOs. J.A. 146-47, 170-71.

3. Not supporting free riding

Respondents claim a right to free ride. That is, they want to exploit the investment Kodak has made in product development, manufacturing and equipment sales in

order to take away Kodak's service revenues. Respondents refuse to make any like investment, as Kodak's equipment competitors have, nor even the much smaller investment to make their own parts. They have targeted the least capital-intensive segment of Kodak's equipment business — service — and ask Kodak to supply them with parts.

Kodak already faces stiff interbrand competition from major companies that have large investments in these industries. It is challenge enough for Kodak to make an adequate return on its investments in that setting, and service revenues are an important part of Kodak's total return. Because of these concerns, Kodak decided not to support the activities of free riders such as respondents. J.A. 137, 147-48, 187-88.

C. Course of Proceedings and Disposition Below

The complaint was filed on April 14, 1987, in the District Court for the Northern District of California and assigned to the Honorable William W Schwarzer. Kodak moved for summary judgment four months later after respondents failed to initiate discovery. Kodak's motion was in part intended to frame the issues that genuinely required discovery, and when respondents thereafter requested discovery on the market power issues, Kodak did not object. J.A. 248. At an initial status conference, Judge Schwarzer encouraged respondents to obtain documents, interrogatory answers, and depositions which would permit them to oppose Kodak's motion on the merits. Respondents did so, and, among other things, deposed several Kodak management personnel. At a later

status conference, Judge Schwarzer allowed further discovery on the market power issues. Pet. App. 36B-37B. On February 1, 1988, after almost six months of discovery, respondents filed their opposition papers. J.A. 408.

Judge Schwarzer granted Kodak's motion for summary judgment on respondents' *per se* tying and monopolization claims. Pet. App. 29B-38B.

The Ninth Circuit, in an opinion by the Honorable Charles E. Wiggins, with a dissent by the Honorable Clifford J. Wallace, reversed Judge Schwarzer's ruling. As to the *per se* tying claim, the majority acknowledged that Kodak does not have market power in the interbrand equipment markets. Pet. App. 8A n.3. The majority also conceded that interbrand competition "might prevent Kodak from possessing power in the [Kodak] parts market," that "equipment purchasers might turn to one of Kodak's competitors if Kodak ties supercompetitively priced service to parts," and that Kodak's "desire to attract new customers might, therefore, keep it from charging supercompetitive prices for service." Pet. App. 8A-9A.

Nonetheless, the majority dismissed Judge Schwarzer's ruling as resting on a "theoretical basis." Pet. App. 10A. It concluded that Kodak might have market power in an intrabrand parts market, despite respondents' concession that Kodak lacked interbrand power, because "market imperfections can keep economic theories about how consumers will act from mirroring reality." *Id*. Neither respondents nor the majority identified any market imperfections, and there is no evidence of imperfections. Rather, the majority held that respondents did not have to

identify specific market imperfections or conduct "a market analysis," because "a requirement that they do so in order to withstand summary judgment would elevate theory over reality." *Id*. The majority then rejected Kodak's business justifications as conceivably "pretextual" and because it believed denying parts to ISOs was not necessarily the least restrictive method to accomplish Kodak's business objectives. Pet. App. 12A-15A. Accordingly, the majority revived respondents' admittedly implausible tying claim.

The majority also reversed Judge Schwarzer's grant of summary judgment as to respondents' Section 2 monopolization claim. It found that the relevant market could be limited to the aftermarket for service of Kodak brand equipment and that Kodak might have monopoly power in that single-brand "market." Pet. App. 19A. Once again, the majority found "logical appeal" in Kodak's claim that it could not have monopoly power in any aftermarket because it lacked equipment market power. *Id*. But the majority deemed itself unable to "say that this theory mirrors reality," despite the absence of evidence to the contrary. *Id*. The majority then, once again, dismissed Kodak's business justifications as conceivably "pretextual" and not "genuine." Pet. App. 18A.

Judge Wallace dissented. As to respondents' *per se* tying claim, Judge Wallace reasoned that interbrand equipment competition necessarily precluded Kodak from having any market power in a parts market. Citing Judge Richard Posner's analysis in *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 236 (7th Cir. 1988), Judge Wallace explained that any effort by Kodak to

engage in supercompetitive pricing in a parts market would be "to its long term disadvantage." Pet. App. 21A.

> [C]ompetition in the interbrand market dictates a simple choice: Kodak may either price parts competitively and maintain its interbrand market share, or it may price parts supercompetitively -- yielding a short-term gain but over the long term destroying its share of the interbrand market. In either case, Kodak is not harming competition: if it adopts the latter strategy, competitive forces will exact a heavy toll in the interbrand market, and profits gained from the short-term parts mark-ups will quickly be eclipsed. The result would be "a brief perturbation in competitive conditions -- not the sort of thing the antitrust laws do or should worry about."

Pet. App. 23A.

As to respondents' monopolization claim, Judge Wallace noted that Kodak had presented uncontradicted evidence of a legitimate business justification: controlling service quality. "*Any* business justification — whether or not it is the least restrictive -- will defeat an attempt-to-monopolize claim." Pet. App. 27A. Thus, even if Kodak's practices were motivated in part by a desire to deny ISOs parts, Judge Wallace reasoned that Kodak's legitimate business justifications mandated summary judgment as to respondents' Section 2 claims.

SUMMARY OF ARGUMENT

All parties to this litigation, and the Ninth Circuit, agree that Kodak lacks market power in the interbrand

copier and micrographics equipment markets. All parties, and the Ninth Circuit, agree that purchasers of copiers and micrographics equipment, when selecting among competing equipment vendors, consider parts and service costs, as well as equipment costs, and will "shun" manufacturers whose total package of equipment, service and parts is "priced too high." J.A. 855.

These undisputed facts preclude the market power necessary to support tying liability under Section 1 of the Sherman Act and the monopoly power necessary to support monopolization liability under Section 2 of the Sherman Act. That is true whether or not Kodak has a dominant share of Kodak-brand parts and service aftermarkets. If Kodak raised its parts or service prices above competitive levels, potential customers would simply stop buying Kodak equipment. Perhaps Kodak would be able to increase short term profits through such a strategy, but at a devastating cost to its long term interests. Thus, due to fierce competition in the interbrand equipment markets, Kodak cannot exercise market power or act anticompetitively in any derivative parts or service aftermarkets.

The Ninth Circuit agreed that interbrand equipment competition would ordinarily prevent Kodak from raising service prices above competitive levels. However, the majority ultimately lost sight of this principle and reversed summary judgment because of an unexplained possibility that the principle might not apply in this case. This "lose[s] sight of the forest because of fascination with the trees." *General Business Systems v. North American Philips Corp.*, 699 F.2d 965, 975 (9th Cir. 1983). The Ninth Circuit's decision is unfounded in the law, incompatible

with the economic and competitive realities underlying the Sherman Act, and contrary to this Court's rulings concerning the role of summary judgment in antitrust litigation.

The Ninth Circuit majority misapplied the market power requirement. First, it held that something "short of actual market power" plus some unspecified "market imperfections" might create tying market power in a Kodak brand parts market. Pet. App. 10A, 12A. That holding is contrary to the requirement of *actual* market power in tying cases reaffirmed by this Court in *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

Second, the majority speculated that Kodak customers might be "locked-in" to Kodak equipment post-sale and therefore insensitive to price. Pet. App. 11A. But the "lock-in" theory does not work either — Kodak must still price competitively to attract new and repeat customers, essential to its survival. The uncontroverted evidence is that Kodak's parts and service pricing is constrained by interbrand equipment competition.

Third, the majority's decision is contrary to the summary judgment standards articulated in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). These cases require the party opposing summary judgment to "set forth specific facts showing that there is a genuine issue for trial," *Anderson*, 477 U.S. at 256, and for antitrust plaintiffs who bring implausible claims — ones that simply make no economic sense — to present even "more persuasive evidence" than ordinarily required. *Matsushita*, 475 U.S. at 587. Here, respondents offered no evidence, let alone persuasive evidence, that Kodak can harm competition in parts or service aftermarkets.

The same analysis disposes of respondents' monopolization claims. If interbrand equipment competition precludes tying market power in derivative aftermarkets, it surely precludes monopoly power in those markets. The Ninth Circuit's speculation that Kodak might have monopoly power in a Kodak brand service market is therefore erroneous. Further, the majority erred by holding that Kodak brand parts could be "essential facilities" that Kodak is required to share with competitors, and by ignoring Kodak's undisputed evidence that its conduct was justified by a high quality service strategy. For these reasons, Kodak's refusal to sell parts to ISOs does not constitute monopolization.

Ultimately, the Ninth Circuit's decision may discourage competition. A manufacturer's ability to innovate and to succeed in competitive interbrand markets is enhanced by its freedom to develop parts and service strategies that improve its total systems offerings. The decision below threatens that freedom. If the decision is allowed to stand, potential innovators will have less incentive to develop new products in service-intensive lines of business for fear that they will expose themselves to treble damage actions at the hands of aftermarket service competitors.

ARGUMENT

I. Kodak's Conceded Lack of Interbrand Market Power Precludes Antitrust Liability.

Respondents' tying and monopolization claims are deficient on several grounds, including (1) that parts and service are not distinct products which can be tied

together,[3] (2) that Kodak's conduct was a unilateral refusal to deal, not a tying arrangement,[4] and (3) that

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[3] J.A. 124-29, 699-701. Replacement parts are an input into service, have no other economic function, and there is no demand for parts other than to provide service. Accordingly, under the standards articulated in *Jefferson Parish* for establishing two products, parts and service are but one product, and cannot be the basis of a tying allegation. *Jefferson Parish*, 466 U.S. at 19-21; *id.* at 39 (O'Connor, J., concurring) ("the tied product must, at a minimum, be one that consumers might wish to purchase separately *without also purchasing the tying product*") (emphasis in original).

[4] J.A. 125-26. Until now the law uniformly protected, as unilateral refusals to deal, manufacturers' refusals to sell replacement parts so long as the interbrand equipment market was competitive. *See Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972); *Nobel Scientific Indus., Inc. v. Beckman Instr., Inc.*, 831 F.2d 537 (4th Cir. 1987), *aff'g and adopting* 670 F. Supp. 1313, 1321 (D. Md. 1986), *cert. denied*, 487 U.S. 1226 (1988); *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1478 (9th Cir. 1986), *modified on other grounds*, 810 F.2d 1517 (1987); *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332, 1337-38 (9th Cir. 1983); *Spectrofuge Corp. v. Beckman Instr., Inc.*, 575 F.2d 256, 282 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979). The sole basis for respondents' tying claim is the contention, which Kodak denies, that Kodak will sell parts separately to its direct equipment customers only if the customer agrees not to use ISO service. Respondents say this is a tying arrangement under *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958), which defined a tie as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, *or at least agrees that he will not purchase that product from any other supplier.*" *Id.* at 5-6 (emphasis added). The latter half of this definition has been criticized on the ground that it blurs the distinction between genuine tying and related practices such as exclusive dealing. *See* ABA Antitrust Section, *Monograph No. 8, Vertical Restrictions Upon Buyers Limiting Purchases of Goods from Others* 89 (1982).

"Kodak service" is not a relevant market which can be restrained or monopolized.[5] However, Kodak has always stressed as its primary argument the undisputed fact that it lacks market power in the interbrand copier and micrographics equipment markets. An equipment manufacturer that faces vigorous competition from other manufacturers and that, accordingly, lacks interbrand market power cannot have power — in any sense that should concern the antitrust laws — in a wholly derivative aftermarket. Respondents' *per se* tying[6] and monopolization claims therefore fail.

A. Market Power Is Required For Tying and Monopolization Liability.

The two antitrust offenses charged here — *per se* tying and monopolization — require a finding of market

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[5] Single-brand service markets are not relevant to antitrust analysis because of the restraining effects of interbrand equipment competition. *See* Part II.A., *infra*. Kodak believes it is simpler to focus on interbrand equipment competition directly, rather than indirectly through market definition, but the two methods of analysis are different sides of the same coin and should not affect the outcome. *See* Brief *Amici Curiae* of Data General Corp. *et al.* for a complete discussion of the market definition perspective.

[6] Respondents have waived any rule of reason tying claim. Pet. App. 4A n.1. The Court may nonetheless wish to consider whether there is any continuing utility in referring to tying arrangements as *per se* illegal given that courts must consider tying market power, substantial adverse affects in the tied product market, and business justifications before condemning a tie. *Compare Jefferson Parish*, 466 U.S. at 11-18, *with Northern Pacific*, 356 U.S. at 5 (*per se* offenses presumed unreasonable "without elaborate inquiry as to the precise harm they have caused or the business excuse for their use").

power. This Court's decision in *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 13-14 (1984), reaffirmed the requirement of actual market power in tying cases: "[W]e have condemned tying arrangements when the seller has some special ability — usually called 'market power' — to force a purchaser to do something that he would not do in a competitive market." Respondents' Section 2 claim requires an even stronger showing of market power, because, as the Ninth Circuit conceded, monopoly power "is something more than the market power that is a prerequisite to liability under Section 1." Pet. App. 19A; *see United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (monopoly power is "the power to control market prices or exclude competition"). If Kodak does not possess Section 1 market power, *a fortiori* it cannot possess Section 2 monopoly power.

Kodak's refusal to sell parts to ISOs cannot enhance or abuse a market power Kodak does not have. It is undisputed that Kodak equipment, parts and service are functionally interrelated; that Kodak markets equipment and service together, J.A. 160-61, 179; and that equipment purchasers consider total costs in choosing among competing equipment sellers. Thus, as Judge Wallace's dissent recognized, an increase in parts or service prices amounts to an increase in the cost of Kodak's equipment: "If Kodak attempts to increase the price of replacement parts above the competitive level, new buyers will increase their estimates of the total price (including parts and service) of a Kodak copier." Pet. App. 20A-21A.

Kodak's behavior mirrors Judge Wallace's analysis. The undisputed evidence, tested by discovery, is that

Kodak prices its parts and service so as not to adversely affect its equipment sales. J.A. 162, 180. In this way, the competitive conditions in the equipment market act as a market check on Kodak's ability to exercise power in aftermarkets. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977) (interbrand competition "provides a significant check on the exploitation of interbrand market power"); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 725 (1988) (same).[7]

Respondents' contention that Kodak "overcharges" for service ignores the relationship between the equipment markets and the aftermarkets. Whenever a manufacturer sells complementary products, such as equipment and service, it must consider how these products are priced in relation to each other. At the extremes, it could (a) offer the product under an extended warranty, in which case the purchaser pays for service in the purchase price, or (b) sell the equipment at the lowest possible purchase price and charge relatively high prices for post-sale service. Firms attempting to respond to competitive dynamics may have legitimate reasons to pursue strategies at any point along this spectrum. *See United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610,

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[7] We recognize that in these cases the Court was confronted with intrabrand competition in the sense of two or more resellers selling the same brand name product. Here, of course, ISOs sell their own brand of service. From the perspective of consumers, however, the distinction is immaterial, since interbrand equipment competition is as much a restraining influence on Kodak's aftermarket practices as it would be on distribution practices limiting the resale of Kodak brand products.

618 (1977) (expensive houses packaged with inexpensive financing). But no matter which strategy it pursues, a seller without market power cannot possibly do better than obtain a competitive return on its overall investment, and it "cannot sustain deleterious practices" that harm consumers. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L. J. 135, 159 (1984). Accordingly, antitrust courts need not intervene.

> Given that a practice indulged without market power is either beneficial to consumers or self-defeating to its practitioners, why use the courts to condemn the conduct? . . . [C]ondemning questionable practices pursued by firms without [market] power will spin the wheels of the courts — at great expense — for no substantial result. Markets have a comparative advantage over courts in dealing with the conduct of firms that lack market power.

Easterbrook, *Comparative Advantage and Antitrust Law*, 75 Calif. L. R. 983, 989 (1987).

Nor would it make any difference if Kodak tried to "overcharge" for service through tying arrangements. Without market power in the interbrand equipment markets, Kodak cannot raise system prices through tying arrangements any more than it could by raising equipment prices directly. Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L. J. 19, 20 (1957) ("[a] competitive supplier, selling at the prevailing price and attempting to impose a tie-in upon a buyer, would merely be displaced by a seller who did not"). *Jefferson Parish* recognized this explicitly: "If the seller of flour has no market power over flour, it will gain none by insisting that its buyers take some sugar as well." 466 U.S. at 37-38

(O'Connor, J., concurring). Thus this Court has restricted liability for tying to those cases in which the package price is supercompetitive. *Fortner*, 429 U.S at 618 (tying is not unlawful where "the price for the entire package was equal to, or below, a competitive price"). Interbrand equipment competition restrains Kodak's ability to obtain supercompetitive returns through any device, including aftermarket tying arrangements.

Past cases consistently recognized these economic realities. In *General Business Systems v. North American Philips Corp.*, 699 F.2d 965 (9th Cir. 1983) (Sneed, J.), the Ninth Circuit found that, as a matter of law, interbrand equipment competition precluded the exercise of market power in an alleged derivative aftermarket for Philips magnetic ledger cards. The court rejected the notion "that a manufacturer, facing competition against which it cannot prevail in the sale of its end product, could be found to monopolize the market for each unique component that goes into the product." 699 F.2d at 975.

Post-*Jefferson Parish* courts and jurists have reached the same conclusion. In *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 797 (1st Cir. 1988) (Breyer, J.), the First Circuit held that an automobile manufacturer's lack of interbrand market power meant it could not have market power over spare parts for its automobiles. In *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 675 (6th Cir. 1986), the Sixth Circuit held that a computer hardware supplier's lack of interbrand market power precluded any market power over a derivative software market. And in *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 236 (7th Cir. 1988), Judge Posner, in dissent, described how overcharging for parts would be a

short-term, self-defeating strategy that need not concern the antitrust laws.[8]

The Ninth Circuit effectively ignored this fundamental principle. Neither the substantive nor procedural basis for its decision withstands scrutiny.

B. Purported Market Imperfections Do Not Excuse Respondents from Proving Genuine Market Power.

The Ninth Circuit majority sidestepped Kodak's lack of interbrand market power by stating that normal economic reasoning might not apply. Purporting to rely on *Jefferson Parish*, the Ninth Circuit determined that "[s]ome strength . . . short of actual market power . . . combin[ed] with other factors" was sufficient for *per se* liability. Pet. App. 12A. Specifically, it held that interbrand market shares of not more than 23% plus unspecified "market imperfections" created a triable issue as to tying market power in a Kodak parts aftermarket. *Id.* at 10A, 12A.

The majority's conclusion is directly contrary to *Jefferson Parish*, which addressed the same issue. The Fifth Circuit had held that the combination of East Jefferson Hospital's 30% market share and market imperfections in the form of imperfect consumer information and other factors were sufficient to create tying market power. This Court reversed. "While these factors may generate 'market power' in some abstract sense, they do not generate

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[8] Judge Posner wrote in dissent because the majority in *Parts and Electric*, believing that the defendant had waived the issue, declined to address market power.

the kind of market power that justifies condemnation of tying." 466 U.S. at 27.

In any event, respondents have never produced, and the majority did not cite, any evidence of competitively significant market imperfections in the copier or micrographics equipment markets. Pet. App. 10A (respondents "have not . . . pin-pointed specific imperfections in the copier and micrographics markets"). Respondents claim that market imperfections *must* exist — despite their failure to show any — because "the actual 'aftermarkets' in which Kodak competes [have] not behaved as Kodak's economic theory would suggest." Brief in Opp. to Pet. for *Cert.* at 9. The majority apparently accepted this argument when it cited and relied upon respondents' claims that Kodak service was "overpriced." Pet. App. 10A-11A. But this misses the point. The question is not how the aftermarkets perform *standing alone*, but whether supercompetitive pricing in the aftermarkets could enhance Kodak's overall position -- and, conversely, harm consumers -- given the inevitable effects of aftermarket pricing on Kodak's future equipment and service sales. The answer is no. Kodak's conceded lack of market power in the equipment market dooms any attempt to extract monopoly profits, even in allegedly "imperfect" aftermarkets.

The fact that respondents may charge less for service than Kodak does not prove, or even raise a triable issue, that Kodak has market power. Respondents are free riders. They exploit Kodak's investments in these markets, do not make similar investments and, therefore, by definition, have a much lower cost base than Kodak. They are analogous to the no-frill discounters described by the

Court in *Sharp Electronics*, 485 U.S. at 721, who were able to undercut the prices charged by full-service retailers because they refused to match the latters' investments in promotion. Free riding is itself a market imperfection, the elimination of which, the Court has held, justifies restrictive competitive practices. *GTE Sylvania*, 433 U.S. at 55; *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 762-63 (1984) (manufacturers may properly take steps to "see that 'free-riders' do not interfere"). Thus, it is circular for free riders to use comparisons of their artificially low prices with the necessarily higher prices of full-investment competitors as evidence of market power.

Nor would it be of any genuine significance if, as respondents now contend, some Kodak equipment customers have difficulty estimating how much service will cost them over the life of the equipment. Brief in Opposition at 14-15. The same imperfect information claim was rejected in *Jefferson Parish*, 466 U.S. at 27-28. Moreover, there is no evidence that Kodak is able to exploit the alleged ignorance of unsophisticated customers. To the contrary, Kodak must and does price its products to appeal to all of its customers, including its many highly sophisticated customers, J.A. 194-95, L001-039, and that is what sets Kodak's maximum package price.[9]

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[9] It is an accepted economic principle that unless a seller has some means of segregating its customers according to the value they place on the seller's goods, (*i.e.*, according to their relative elasticities of demand or reservation prices), it cannot engage in price discrimination. F.M. Scherer, *Industrial Market Structure and Economic Performance* 315 (2d ed. 1980). In such a case, the seller must set its price equal to the lowest reservation

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In short, no market is perfect; nor do all buyers ever have perfect information. But the markets in which Kodak competes are not so imperfect that basic economic realities are suspended.

C. A Post-Sale "Lock-In" is Not a Substitute for Interbrand Market Power.

To find a substitute for actual market power, the Ninth Circuit majority next turned to its own decision in *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1342 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985), which held that tying market power can be enhanced if a seller's existing customers are "locked-in" to its product. Pet. App. 8A, 11A. The majority never explained how *Digidyne* applied to this case, other than to refer to respondents' contention that in isolated instances "some owners of large Kodak equipment packages will pay higher prices for Kodak service rather than switch to competitors' systems." *Id.* at 11A. There is no basis in principle or fact for the application of a lock-in theory in this case.

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price of the customers it seeks; otherwise it will lose their business. Therefore, to the extent that better informed consumers would value Kodak's "overpriced" products less, *i.e.*, would have lower reservation prices, they protect less informed consumers by forcing Kodak to lower prices. *See* Schwartz & Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. Pa. L. Rev. 630, 638 & n.16 (1979) ("consumers who search [for information] benefit consumers who do not").

Digidyne has been roundly criticized and expressly rejected by several courts.[10] At the core of this persistent criticism is the Ninth Circuit's failure to recognize — in both *Digidyne* and this case — the effect that a post-sale lock-in strategy would have on new and repeat product sales. A lock-in strategy works only if Kodak can make more total profit by overcharging its existing customers for service than it will lose as its new and repeat product sales dry up. *See* Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L. J. at 21 ("the central prerequisite for a successful tie-in" is that the profits from the tied product must exceed the profits sacrificed by lessening demand for the tying product). That is impossible where the effect of a tie is to increase the price of a product sold in a competitive market, such as the equipment markets

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[10] *See, e.g., A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 676 (6th Cir. 1986); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673 n.4 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986); *Town Sound & Custom Tops, Inc. v. Chrysler Motor Corp.*, 743 F. Supp. 353, 362-63 (E.D. Pa. 1990); *Tominaga v. Shepherd*, 682 F. Supp. 1489, 1495 (C.D. Cal. 1988); *see also* Note, *Tying Arrangements and the Computer Industry: Digidyne Corp v. Data General Corp.*, 1985 Duke L. J. 1027 (1985). Indeed, another panel of the Ninth Circuit criticized and narrowly interpreted *Digidyne* in *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342, 1346 n.4 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988). Moreover, Justices White and Blackmun of this Court would have granted *certiorari* in *Digidyne* to address, among other issues, "what constitutes forcing power in the absence of a large share of the general market" and "whether market power over 'locked in' customers must be analyzed at the outset of the original decision to purchase." *Data General Corp. v. Digidyne Corp.*, 473 U.S. 908, 909 (1985) (White, J. and Blackmun, J., dissenting from denial of *certiorari*).

in which Kodak competes. Judge Posner recognized this in *Sterling*, where he described a similar strategy as "a short-run game, since as soon as word [of the tie-in] got out no one would buy Sterling motors." *Sterling*, 866 F.2d at 236 (Posner, J., dissenting).

Overcharging for service is an especially implausible strategy for Kodak, since demand for Kodak service is itself ultimately dependent on new equipment sales. J.A. 162, 180. In economic terms, demand for service is a "derived demand." *See* G. Stigler, *The Theory of Price* 242 (3d ed. 1966). If demand for new Kodak equipment falls, Kodak's installed base of equipment will be reduced, and demand for service will decline. Excessive service pricing therefore has not only the primary effect of reducing new and repeat product sales, but a secondary effect of reducing future service sales and the revenues that would follow from them. J.A. 162.[11] It is inconceivable that the adverse effects of such a strategy on Kodak's long term profitability would be outweighed by any short term profits Kodak might be able to obtain. Thus, as noted earlier, the undisputed evidence is that Kodak prices its service contracts to protect its new equipment sales. J.A. 162, 180.

Even if it were viable, the lock-in theory does not apply here. Unlike plaintiffs in *Digidyne*, respondents offered no explanation as to how or why Kodak

[11] In addition, respondents' theory requires that competing equipment vendors permit Kodak's customers to remain ignorant and do not attempt to increase their own sales by publicizing Kodak's post-sale practices. Sellers in a competitive market would do precisely the opposite.

customers are locked-in in any meaningful sense.[12] Rather, as Judge Schwarzer observed, the evidence here is merely that "customers who have purchased Kodak equipment in a competitive market will tend to retain that equipment for its economic life." Pet. App. 34B. That is true in all markets, and cannot be the basis for an exception to the requirement of actual market power.[13]

D. The Market Power Issue was Appropriately Addressed on Summary Judgment.

The Ninth Circuit acknowledged that Kodak lacked market power in the interbrand equipment market, and that respondents had neither conducted their own market analysis nor presented evidence of specific market imperfections that would permit supercompetitive pricing in an aftermarket. Pet. App. 10A. Nonetheless, contending

[12] In their initial response to Kodak's summary judgment motion, respondents claimed that owners of micrographics equipment (not copiers) faced a technological lock-in due to incompatibilities between competinq brands of micrographics equipment. J.A. 354-57. Kodak responded with evidence that its products conformed to industry standards that precluded such incompatibilities. J.A. 707-10; L188-209. Respondents have not raised the issue since then, relying instead on the concept of post-purchase depreciation typical of all durable goods.

[13] *Digidyne* is inapposite for another reason. In that case the Ninth Circuit found that the defendant had point-of-sale market power, and held only that the lock-in enhanced that power. *Digidyne*, 734 F.2d at 1343. Indeed, *Digidyne* appears to accept the logic of the point that is relevant here: that, in the absence of point-of-sale market power, consumers will avoid purchasing products from manufacturers that engage in post-purchase anticompetitive practices. *Id.* at 1342.

that "a requirement that they do so in order to withstand summary judgment would elevate theory over reality," it reversed the District Court. *Id.* That decision fundamentally undercuts the role of summary judgment in antitrust litigation, and in litigation generally.

First, the Ninth Circuit's decision ignores this Court's mandate in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986), that the opponent of summary judgment must "set forth specific facts showing that there is a genuine issue for trial." Respondents never carried that burden. The majority acknowledged they had not, yet reversed anyway on the ground that there was a theoretical possibility that Kodak had tying market power. That was error. The burden to set forth specific facts means that an antitrust plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. A theoretical possibility of a material dispute is plainly insufficient.

Respondents' evidence was especially deficient in light of the inherent implausibility of its aftermarket power theory. In *Matsushita*, this Court held that if the factual context of an antitrust claim "renders the claim implausible — if the claim is one that simply makes no economic sense — [plaintiffs] must come forward with more persuasive evidence than would otherwise be necessary" to defeat summary judgment. 475 U.S. at 587.[14]

[14] Specifically, *Matsushita* rejected an expert's opinion that the alleged conspirators had depressed prices and sold goods at substantial losses. 475 U.S. at 594 n.19, 601-03. The Court found that the expert's evidence of below-cost pricing had

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This principle arises from the *Matsushita* rule that "antitrust law limits the range of permissible inferences from ambiguous evidence." 475 U.S. at 588. As Justice (then-Judge) Kennedy explained in *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987):

> Where a party asserts there is a genuine issue for trial . . . its argument is measured by the underlying theory of the claim or defense being considered. . . . [If] the substantive law is the law of antitrust, and if the claim makes no economic sense, a speculative inference from the jury will not help it. In such an instance, the record on summary judgment must contain further persuasive evidence if it is to support the claim.

Accord Eichman v. Fotomat Corp., 880 F.2d 149, 161 (9th Cir. 1989). *See also Mid-State Fertilizer Co. v. Exchange Nat. Bank of Chicago*, 877 F.2d 1333, 1338-40 (7th Cir. 1989); *Argus Inc. v. Eastman Kodak Co.*, 801 F.2d 38, 45 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987). In short, evidence that might otherwise permit a plaintiff to survive summary judgment will not save a plaintiff whose claims make no economic sense.

The *Matsushita* standard applies in this case. Reduced to its essentials, respondents' theory is that a firm which faces vigorous competition and concededly lacks interbrand market power nonetheless can earn supercompetitive profits. For all the reasons previously discussed, that "simply makes no economic sense." *Matsushita*, 475 U.S.

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"little probative value in comparison with the economic factors . . . that suggest that such conduct is irrational." *Id.* at 594 n.19.

at 587. Courts should never be required to send such inherently implausible antitrust claims to juries. However, if they must, the plaintiffs should at least be required to prove under the standard announced in *Matsushita* that there is specific reason to believe that normal economic reasoning does not apply. They should not be entitled to the presumption afforded to respondents that there is a triable issue whenever unsubstantiated doubts exist.[15]

The Ninth Circuit's decision further undercuts this Court's teachings in *Matsushita* to the extent that it mandates, as respondents imply, extensive discovery in all antitrust cases. The dispositive fact in this case, Kodak's lack of market power in the interbrand equipment markets, was conceded. Respondents' request for "full discovery," whatever that means, is therefore pointless.[16] There is nothing that respondents could prove that

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[15] Respondents point to the declaration of Paul Hernandez, president of one of respondent companies, as evidence of market imperfections. His testimony, however, was conclusory hearsay, lacking any foundation, as Kodak pointed out below. Record No. 46 at 7. Such inadmissible testimony cannot suffice to prevent summary judgment in any case. *See* Fed. R. Civ. Proc. 56(e) (opposition to well-grounded summary judgment motion must be supported by admissible evidence); *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 643 (2d Cir. 1988); *Keebler Co. v. Murray Bakery Prod.*, 866 F.2d 1386, 1389 (Fed. Cir. 1989). It should not be allowed to do so here, where respondents' claims make no economic sense.

[16] Summary judgment need not await the completion of boundless "full" discovery. To the contrary, a requirement that antitrust litigants spend months, if not years, and hundreds of thousands, if not millions, of dollars establishing market facts

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would overcome Kodak's conceded lack of market power. *See Anderson*, 477 U.S. at 248 ("[f]actual disputes that are irrelevant or unnecessary" do not preclude summary judgment).

Moreover, the record below is hardly "sparse," as respondents contend. Respondents' Supp. Brief in Opp. to *Cert.* at 10. Kodak responded to broad-written discovery from respondents, J.A. 255-325, and respondents took several depositions of Kodak management personnel. They thereafter requested additional discovery, and Judge Schwarzer instructed them to take two more depositions, focused on the market power issue. Pet. App. 36B-37B. Finally, when respondents sought relief under Rule 56(f) of the Federal Rules of Civil Procedure in their opposition to summary judgment, as Judge Schwarzer told them to do, Pet. App. 37B, they merely made a conclusory assertion that with further (unspecified) discovery, they could support "each of the facts stated" in their Memorandum of Points and Authorities. J.A. 527.[17]

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that are *conceded* would chill efficient business conduct. District Courts must maintain the ability to frame efficient, limited discovery plans. *See First Nat. Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253 (four depositions and limited document discovery were sufficient discovery in antitrust conspiracy case), *reh'g denied*, 393 U.S. 901 (1968).

[17] Respondents also alleged that two ISO customers had refused to sign truthful affidavits, unsigned copies of which respondents attached to their opposition papers. J.A. 535-42. The statements contained in the affidavits, however, even if true, had nothing to do with Kodak's lack of market power and, thus, would not help respondents avoid summary judgment. *See Willmar Poultry Co. v. Morton-Norwich Products, Inc.*,

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Judge Schwarzer, whose expertise in the field of summary judgments is well known to this Court,[18] properly determined that respondents' attempt to invoke Rule 56(f) was fatally deficient because they failed to disclose "what additional discovery may be needed or how it may help plaintiffs cure the fatal deficiencies in their case." Pet. App. 37B; *see Cities Service*, 391 U.S. at 297-98 (party appropriately denied further discovery under Rule 56(f) where application did not show that additional discovery would be helpful to defeat summary judgment).

The summary judgment granted in this case was substantively sound and procedurally fair. Kodak's conceded lack of market power was, and is, dispositive.

II. The Ninth Circuit's Decision Improperly Extends the Essential Facilities Doctrine.

The Court need not address respondents' monopolization claim under Section 2 of the Sherman Act except to

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520 F.2d 289, 297 (8th Cir. 1975), *cert. denied*, 424 U.S. 915 (1976) (court need not permit further discovery where it will not help defeat summary judgment); *Fisher v. Metropolitan Life Ins. Co.*, 895 F.2d 1073, 1078 (5th Cir. 1990) (same).

[18] Judge Schwarzer's writings on summary judgment have been cited on numerous occasions by this and other courts. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), *citing* Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 467 (1984); *see also TransWorld Airlines, Inc. v. American Coupon Exchange, Inc.*, 913 F.2d 676, 684 (9th Cir. 1990); *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1197 (5th Cir. 1986).

recognize, as discussed above, that interbrand equipment competition precludes any finding of monopoly power in derivative aftermarkets. That alone is sufficient to support summary judgment.[19] However, the majority's discussion of Section 2 is erroneous on three additional grounds. First, it improperly holds that "Kodak service" could be a distinct relevant market which Kodak could monopolize. Second, it misapplies this Court's decisions regarding the essential facilities doctrine by holding that Kodak brand replacement parts could be essential facilities. Third, it improperly rejects as a defense undisputed business justifications for Kodak's practices.

A. "Kodak Service" is Not a Relevant Market.

In *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 393 (1956), this Court rejected the notion that the relevant market in an antitrust case could be limited to one brand of a product or service:

> [O]ne can theorize that we have monopolistic competition in every nonstandardized commodity with each manufacturer having power over the price and production of his own product. However, this power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must

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[19] The majority conceded that it had "more trouble" with the question of monopoly power, which "is not as easily answered" as the question of market power. Pet. App. 18A-19A. But without any further evidence, much less further analysis, the majority simply assumed its own answer and concluded that a triable issue exists as to monopoly power. Pet. App. 19A.

be appraised in terms of the competitive market for the product.

This principle has been faithfully followed in numerous decisions rejecting proposed definitions of the relevant market limited to a single-brand product or its components, such as service. *See, e.g., General Business Systems*, 699 F.2d at 975; *Mozart*, 833 F.2d at 1346-47; *Kenworth of Boston, Inc. v. Paccar Financial Corp.*, 735 F.2d 622, 623-24 (1st Cir. 1984); *Kingsport Motors, Inc. v. Chrysler Motors Corp.*, 644 F.2d 566, 571 (6th Cir. 1981); *Spectrofuge Corp. v. Beckman Instr., Inc.*, 575 F.2d 256, 286 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *Telex Corp. v. IBM Corp.*, 510 F.2d 894, 919 (10th Cir.), *cert. dism'd*, 423 U.S. 802 (1975). For example, in *Bushie v. Stenocord Corp.*, 460 F.2d 116, 121 (9th Cir. 1972), the Ninth Circuit affirmed the dismissal of a claim that a manufacturer of dictating machines had monopolized a market limited to the service of its own products where there was no evidence that defendant "dominated the market for office dictating machines generally."

The Ninth Circuit in this case assumed there could be a single-brand service market and, without citing any evidence, held there were triable issues as to whether Kodak had monopoly power in it. Pet. App. 18A-19A. That assumption was error. Single-brand service markets are, by definition, derivative of the markets for the equipment requiring service. For all the reasons discussed previously, they cannot be monopolized, in any sense that harms consumers, unless the equipment manufacturer has equivalent monopoly power in the interbrand equipment market. *See* pp. 16-27, *supra*. Respondents promote the notion of a single-brand service market because it

provides a colorable rationale to ignore, as "outside the market," the restraining effects of interbrand equipment competition. But interbrand competition cannot be ignored; it is the "primary concern" of the antitrust laws. *GTE Sylvania*, 433 U.S. at 52 n.19. To preserve the principle established in *duPont*, the Court should hold as a matter of law that there can be no claim for monopolization of a single-brand service market.

B. Replacement Parts are Not Essential Facilities.

The majority acknowledged the general rule that even a monopolist has "no duty to deal with its competitors." Pet. App. 16A; *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). However, it held that Kodak might fall within an exception to that rule, because "a monopolist may not retaliate against a customer who is also a competitor by denying him access to a facility essential to his operations, absent legitimate business justifications."[20] Pet. App. 16A-17A.

Prior to this case, no court had ever held that a single manufacturer's brand-name replacement parts may constitute an "essential facility" that it must share with its competitors. That result cannot be squared with this Court's decisions in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973), or *Aspen Skiing Co. v. Aspen*

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[20] As the majority conceded, respondents did not raise this argument in the District Court. Pet. App. 16A n.7. But the majority nonetheless proceeded to decide it based on its reasoning that the District Court might somehow have considered the issue anyway. *Id.* That decision was improper. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

Highlands Skiing Corp., 472 U.S. 585 (1985), upon which the Ninth Circuit purported to rely.

Both *Otter Tail* and *Aspen* are limited decisions which do not, under any reading, establish general duties to deal with competitors. In *Otter Tail*, the Court was faced with a natural monopoly, a regulated electric utility, that refused to "wheel" power to competing municipal utilities. The defendants' power lines were deemed to be an essential facility because competitors could not feasibly duplicate them, as much for regulatory as economic reasons. *Id.* at 377-78. As Professor Areeda has noted, *Otter Tail* turns on these peculiar facts: "*Otter Tail* is very limited. Not only was the defendant a natural monopolist, it was regulated and its activities may have evaded that regulation, to the prejudice of consumers." Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 848 (1990).

Aspen is not even an essential facilities case; this Court expressly declined to consider plaintiff's essential facilities claim and instead addressed the termination of a joint marketing arrangement unlike anything in this record. 472 U.S. at 611 n.44. In *Aspen*, the defendant was a conceded monopolist, 472 U.S. at 596, that had for sixteen years participated in a presumptively efficient joint marketing arrangement with a competitor. *Id.* at 604-07 and n.31. Then, without "any efficiency justification whatever," it terminated that arrangement. 472 U.S. at 608. The jury found, and the Court agreed, that the defendant had acted with the "specific intent to drive [plaintiff] from the market by means other than superior efficiency." *Id.* at 608 n.39. Thus *Aspen* holds, at most, that a monopolist may violate Section 2 by terminating, without any efficiency

justification, a long-standing and efficient cooperative relationship necessary for the preservation of a competitive market.

By contrast to *Otter Tail* and *Aspen*, Kodak is not a monopolist in any relevant market; it has no natural monopoly; there is no danger that it is evading regulation; it had no long-standing cooperative relationship with respondents; and there is no evidence whatever that it acted with the intent to exclude competition on a basis other than greater efficiency. To the contrary, its quality control business justification was undisputed. *Otter Tail* and *Aspen* therefore do not apply.

There is no basis in principle for extending the essential facilities doctrine to Kodak's control over Kodak brand replacement parts. For a competitive asset to be deemed so "essential" that it must be shared, it must be impractical to duplicate by equally efficient competitors. *See, e.g., United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383, 405 (1912) (bridge that could not be duplicated); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) (local telecommunications facilities that were franchise monopolies); Note, *Rethinking the Monopolist's Duty to Deal: A Legal and Economic Critique of the Doctrine of "Essential Facilities"*, 74 Va. L. Rev. 1069, 1073 (1988); *see also* Krattenmaker & Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L. J. 209 (1986). Kodak replacement parts are not impractical to duplicate. In fact, nothing in this record suggests any reason why respondents cannot obtain replacement parts on their own. Respondents claim that 90% of all Kodak

replacement parts are made outside Kodak. J.A. 740. They concede they can buy many parts from OEMs, just as Kodak does. J.A. 740. They also can and do disassemble used equipment for parts. The truth is that respondents simply do not want to go through the trouble and expense of investing in parts stocks as Kodak and other full-investment competitors have. They prefer to have Kodak procure and stock parts for their benefit, *i.e.*, to free ride. Nothing in this Court's essential facilities cases requires Kodak to assist that endeavor.

C. Kodak's Conceded Business Justifications Preclude Section 2 Liability.

This Court has recognized that even a monopolist's conduct cannot be branded unlawful if it has a legitimate business justification. *Aspen*, 472 U.S. at 608-10 (conduct lawful if product of a "normal business purpose"); *Grinnell*, 384 U.S. at 570-71. This principle is firmly ingrained in Ninth Circuit monopolization cases, *e.g.*, *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 368 (9th Cir.), *cert. denied*, 488 U.S. 870 (1988) (a monopolist's duties under Section 2 "arise only when there is no justification for refusing to aid a competitor"), and the majority repeated it. Pet. App. 16A-18A. But then it brushed aside each of the three business justifications Kodak had for its conduct: promoting high quality service, reducing inventory costs, and eliminating free riding. *Id.*; *see* pp. 5-8, *supra*. The majority found that Kodak's first two business justifications might be "pretextual" and not "genuine," and it held as a matter of law that not wanting to promote free riding was an illegitimate business justification. Pet. App. 17A-18A; *see also id.*

at 12A-14A (rejecting Kodak's business justifications in the context of respondents' tying claims).

As Judge Wallace noted in dissent, there was absolutely no evidence suggesting that Kodak's high-quality service strategy was in any way pretextual. Pet. App. 25A ("Kodak submitted extensive and undisputed evidence of a marketing strategy based on high-quality service"). The only evidence cited by the majority was respondents' claim that Kodak first refused to sell one ISO parts shortly after it began bidding against Kodak. Pet. App. 13A-14A. Even if that is true, it is not inconsistent with Kodak's high-quality service strategy. As discussed above, selling parts to ISOs undercuts Kodak's strategy, and, accordingly, it tries not to sell them parts.[21] Moreover, as Judge Wallace noted, it does not matter whether or not Kodak may have had some "monopolistic" motivations along with its legitimate business justifications: "[T]he desire to maintain market power -- even a monopolists' [sic] market power — cannot create antitrust liability if there was a legitimate business justification for [the challenged action]." Pet. App. 27A. *See also Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1109-13 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 1473 (1990); *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 378 (7th Cir. 1986).

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[21] Previous decisions of the Ninth Circuit have held that a quality control justification is sufficient to preclude Section 2 liability. *See, e.g., Mozart*, 833 F.2d at 1350-51, 1352; *Drinkwine v. Federated Publications, Inc.*, 780 F.2d 735, 740 (9th Cir.), *cert. denied*, 475 U.S. 1087 (1986).

The majority's focus on whether Kodak was subjectively motivated by anticompetitive intent and whether Kodak's quality control business justification was "genuine" therefore misses the point. Most lawful, procompetitive business practices are by definition designed to take business from competitors. To make motivation the test of liability would inevitably chill those lawful practices. Thus, it has "become an antitrust commonplace . . . that if conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors . . . is irrelevant." *Olympia*, 797 F.2d at 379. *See also* III P. Areeda & D. Turner, *Antitrust Law* ¶ 626 at 76 (1978).

Finally, it was error for the majority to reject as a legitimate business justification Kodak's desire not to promote free riding. This Court squarely held in *GTE Sylvania* that free riding is a market imperfection that a manufacturer may legitimately take steps to eliminate — even through combinations and conspiracies that might otherwise violate Section 1 of the Sherman Act. *GTE Sylvania*, 433 U.S. at 55; *Monsanto*, 465 U.S. at 762-63. Kodak, acting unilaterally, should be able to do the same. That this conduct may be exclusionary -- by excluding free riders — is beside the point. The free rider's option is to make the same investments as its competitors, not to seek protection (and treble damages) from antitrust courts.

III. The Ninth Circuit's Decision Hinders Innovation and Frustrates Competition.

Kodak's practices do not violate the antitrust laws because they cannot harm competition. To the contrary,

Kodak's practices are dictated by and promote interbrand competition. Kodak's innovative equipment offerings, which are the sole basis for respondents' business existence, have given copier and micrographics equipment users more and better choices in a robust marketplace. Kodak's ability and desire to develop new equipment is enhanced by its freedom to select parts and service strategies that it believes will support those products. The antitrust laws operate to preserve that freedom, not restrain it. If a company that innovates and creates a new product is compelled to surrender the fruits of that innovation to others, "success would yield not rewards but legal castigation," and "[t]he antitrust laws would . . . compel the very sloth they were intended to prevent." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

Every manufacturer of sophisticated business equipment faces the same situation as Kodak. As it decides whether or not to devote resources to innovative equipment, the manufacturer must consider its freedom to develop marketing plans, including high-quality service strategies, that will allow it to compete effectively. Manufacturers in highly competitive industries should not have to worry that antitrust courts will second guess their strategies, or even that they will have to go to trial to be vindicated. That is why summary judgment is so important in this case. Reinstating the summary judgment entered by Judge Schwarzer will remove the chilling effect that the threat of protracted litigation has on even the most laudable competitive behavior. It will reaffirm that the antitrust laws are designed to protect competition, not competitors, and to promote innovation and

freedom of choice by firms, like Kodak, that face vigorous competition.

CONCLUSION

The Ninth Circuit's decision should be reversed and the summary judgment in favor of Kodak granted by Judge Schwarzer should be reinstated.

Respectfully submitted,

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